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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RUSSELL JOSEPH MERCK,

Defendant and Appellant.

D072682

(Super. Ct. No. SCD262950)

APPEAL from a judgment of the Superior Court of San Diego County,
Amalia L. Meza, Judge. Affirmed.

Conrad D. Petermann, under appointment by the Court of Appeal, and Siri Shetty
for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, Robin H. Urbanski and Kristen
Kinnaird Chenelia, Deputy Attorneys General, for Plaintiff and Respondent.

I.

INTRODUCTION

Defendant Russell Joseph Merck appeals the sentence imposed on him by the trial court related to a crime spree in which he committed multiple home burglaries. The criminal proceedings against Merck were twice suspended after Merck was determined to be mentally incompetent to stand trial. Upon reinstatement of the proceedings, Merck was convicted of multiple offenses, and he admitted having suffered prior convictions, including a prior strike conviction.

On appeal, Merck contends that his trial counsel rendered ineffective assistance by failing to present to the court the results of recent mental health evaluations of Merck, and providing insufficient information regarding Merck's mental health history and his impaired mental condition at the time he committed the offenses, in support of Merck's *Romero*¹ motion.

After we issued our original opinion in this case, the Supreme Court granted review and transferred the cause back to us with directions to vacate our prior opinion and "reconsider the cause in light of Senate Bill No. 1393 [(S.B. 1393)] (Stats. 2018, Ch. 1013)." S.B. 1393 amends Penal Code² sections 667, subdivision (a) and 1385, subdivision (b), effective January 1, 2019, to give trial courts discretion to dismiss or strike a prior serious felony enhancement for sentencing purposes.

¹ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

² Further statutory references are to the Penal Code unless otherwise indicated.

We now reissue our original opinion, adding a new section in which we address Merck's contention that he is entitled to have his sentence vacated to allow the trial court to resentence him and to exercise its discretion with respect to whether to dismiss the prior serious felony enhancement.

As we concluded in our previous opinion, contrary to Merck's contention, the record does not demonstrate that trial counsel's performance fell below an objective standard of reasonableness. We therefore affirm Merck's judgment of conviction.³

However, as the People concede, under the law as amended effective January 1, 2019, Merck is entitled to resentencing to allow the trial court to exercise its discretion with respect to the five-year prior serious felony enhancement term that the trial court imposed. We therefore vacate Merck's sentence and remand for resentencing.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual background*

1. *The facts underlying counts 1 and 2*

On the evening of June 18, 2015, P.E. and his husband P.S. were asleep in their home in San Diego. At 11:00 p.m., they heard their front gate squeak, which caused their

³ Merck has also filed a petition for habeas corpus, raising many of the same issues that he raised in his direct appeal. This court ordered that the petition for habeas corpus be considered with the direct appeal. We summarily dismissed Merck's petition for habeas corpus by separate order prior to the issuance of our original opinion in this matter.

dogs to bark. P.S. went downstairs and saw that the back door was open. He did not notice that anything was missing.

Two days later, a gemologist whom P.E. and P.S. had never met contacted P.E. by e-mail and later, in person, to ask P.E. whether he owned, had disposed of, or had stolen from him a Naval Academy sword with his name engraved on it. The gemologist, who had come into possession of the sword through his business, suspected that the sword was stolen. At that point, P.E. noticed that his Naval Academy sword, which had been displayed on a table immediately inside the front door of his home, was missing. The gemologist returned the sword to P.E.

On the day before the gemologist contacted P.E., Merck had come into the gemologist's shop and offered to sell the Naval Academy sword. The gemologist perceived that the sword did not belong to Merck, and negotiated a trade with Merck to exchange the sword for a bracelet.

2. The facts underlying counts 3, 4, 5, 6, and 7

On June 28, 2015, just before midnight, Merck climbed over a locked gate at the Renaissance Condos on Front Street. He entered the unlocked patio door of the unit where E.P. and B.P. were sleeping. Merck took a cell phone and a purse from inside the unit.

The following day, Merck used a credit card belonging to B.P. at two 7-Eleven stores and at a Del Taco. When he attempted to use it a second time at the Del Taco, a restaurant worker declined the card.

3. *The facts underlying count 8*

On June 29, 2015, Merck broke into San Diego High School and ransacked the principal's office and an administrative assistant's office. Merck had gained entry to the school through a window that he had forced open. While Merck was inside the school, he took a can of Pellegrino water from a cabinet in one of the offices and drank it. Merck left the can in the other office. Merck also took a camcorder from the school.

4. *The facts underlying count 9*

On July 8, 2015, San Diego Police Officer Sean Losee saw Merck walking on 22nd Street in San Diego. Losee was aware that there was a felony warrant for Merck's arrest, and he yelled for Merck to stop. As Losee got out of his patrol car, Merck took off running. Losee made a U-turn, but lost sight of Merck.

5. *The facts underlying counts 10 and 11*

On July 9, 2015, San Diego Detective Sergeant Christopher Asbell was actively searching for Merck in order to arrest him on the outstanding felony warrant. Asbell saw Merck enter a homeless encampment. Asbell broadcast to other law enforcement officers the location where he had seen Merck. Officers entered the encampment and ordered Merck to come out. Merck fled the encampment, escaping down a "manhole tube." Officers were unable to locate him.

The following day, Detective Asbell spotted Merck again, close to a transient encampment near the intersection of Pershing Drive and 26th Street. Merck was pushing a bicycle along Pershing Drive. Asbell broadcast information about Merck's location, and approximately eight officers responded. Before officers could contact Merck, he fled

southbound into a large concrete storm culvert. One of the officers who was pursuing Merck tore his Achilles tendon while trying to climb out of the open culvert.

B. Procedural background

On July 15, 2015, the San Diego County District Attorney filed the original complaint in this case, charging Merck with two counts of first degree burglary (counts 1, 3; §§ 459, 460, subd. (a)); two counts of misdemeanor receiving stolen property (counts 2, 11; § 496, subd. (a)); three counts of misdemeanor use of personal identification of another (counts 4–6; § 530.5, subd. (a)); one count of attempted use of personal identification of another (count 7; §§ 530.5, subd. (a), 664); and three counts of resisting an officer (counts 8–10; § 148, subd. (a)(1)). The complaint further alleged that Merck committed counts 1, 3, 4, 5, 6, and 7 while on felony probation (§ 1203, subd. (k)). The complaint also alleged that Merck had suffered a serious felony prior conviction (§§ 667, subd. (a)(1), 668, 1192.7, subd. (c)), and a prior strike conviction (§§ 667, subds. (b)–(i), 1170.12, 668).

In late July 2015, Merck's criminal proceedings were suspended so that a competency evaluation could take place. On October 7, 2015, Merck was found to be not mentally competent to stand trial, and was remanded to Patton State Hospital. On January 25, 2016, the court found Merck mentally competent to stand trial and reinstated the criminal proceedings against him.

In mid-March 2016, the criminal proceedings were again suspended to allow for Merck's mental competency to be evaluated. On May 11, 2016, the court found that Merck was not mentally competent to stand trial and ordered him returned to Patton State

Hospital. On November 28, 2016, the court found that Merck's mental competency had been restored and reinstated the proceedings.

On January 17, 2017, the People filed a third amended complaint that set forth substantially similar charges and allegations that were charged in the original complaint, with an additional burglary count and the allegation that Merck had served a prior prison term (§§ 667.5, subd. (b), 668).⁴

A bench trial was held. On June 20, 2017, the court found Merck guilty as charged. Merck admitted having suffered the prior convictions alleged in the information.

The trial court sentenced Merck to a total term of 18 years four months in prison. This sentence included a five-year enhancement term for Merck's prior serious felony conviction (§§ 667, subd. (a)(1), 668, 1192.7, subd. (c)). The court dismissed Merck's prison prior allegation.

Merck filed a timely notice of appeal.

III.

DISCUSSION

A. Trial counsel did not render ineffective assistance

Merck contends on appeal that his trial counsel was ineffective because he "failed to raise appellant's compelling lengthy history of mental disorder as mitigating support for a vastly lesser sentence." (Capitalization omitted.) According to Merck, his trial

⁴ The third amended complaint did not include a previously alleged count of receiving stolen property.

counsel failed to address the fact that Merck had an "implicit mental condition during the offenses," and failed to address the severity and duration of that mental condition. He contends that his trial counsel's failure to sufficiently bring to the court's attention his lengthy mental health history constituted ineffective assistance of counsel.

1. *Additional background regarding sentencing*

Prior to the sentencing hearing, the prosecution filed a statement in aggravation, which noted that the criminal proceedings against Merck had been suspended twice, once for approximately 6 months, and again for approximately 8 months, as a result of Merck having been deemed incompetent to stand trial. The prosecution requested that the trial court select the upper term and sentence Merck to a term of 30 years four months in prison, based in large part on Merck's consistent and violent criminal history.

Defense counsel filed a statement in mitigation. In the statement, defense counsel requested that the trial court strike Merck's prior strike conviction and choose the low term. Defense counsel sought a total term of 14 years six months in prison. The statement in mitigation repeatedly referred to Merck's mental health issues, and specifically noted that "the court file contains more than adequate evidence of client's history of legal incompetency issues, and by extension mental health issues, in the form of two separate commitments to Patton State Hospital pursuant to Penal Code section 1368 during the pendency of this case alone." (Italics omitted.)

Defense counsel also noted that the crimes were unsophisticated, and stated that Merck "is a simple person, *suffers from addiction and untreated mental health issues* and appears to be the very definition of an unsophisticated person." Counsel noted elsewhere that Merck "has chronic mental health issues and drug addiction issues both of which are untreated as [Merck] has spent all of his adult life living a transient lifestyle or in jail."

In support of the *Romero* motion, counsel offered that "[t]his was essentially a non-violent offense committed by a 24-year old man who has never received proper mental health or substance abuse treatment."

The probation officer's report and supplemental report recommended a total sentence of 23 years four months.⁵

At sentencing, the trial court stated that it had reviewed the probation reports, as well as the statements in aggravation and mitigation, and Merck's *Romero* motion. The court asked counsel whether they had any further comments. Although defense counsel initially said that he would submit on his *Romero* arguments, he added, "Obviously the court file reflects that he had two different lengthy commitments to Patton State Hospital for mental-health issues. I believe Mr. Merck has significant mental-health issues that [are] untreated and . . . are going to be aggravated [if the court just sends him to prison,] so I think we're in the situation where I don't think prison[is] the right remedy for him." Defense counsel acknowledged that the trial court had limited options with respect to sentencing, due to Merck's criminal record, but added, "I just wanted to note that I think

⁵ Merck had declined to speak about his personal history and no personal information was included in the report.

it's a major failing in the system to allow someone with significant mental-health issues to go untreated and just incapacitate him in prison which is going to make it worse for everybody. When he gets out, he's going to be untreated having spent a long time in prison with the kind of issues he has. It's creating a monster instead of trying to treat it before that happens."

The prosecutor, in response, highlighted that Merck had gone on a crime spree, that the burglaries he committed were not victimless crimes even though no one had been physically hurt, that significant resources had to be utilized in pursuing Merck, and that Merck had a criminal history that began at the age of 11. The prosecutor pointed out that Merck had been committing crimes consistently over many years, and that his crimes were increasing in seriousness. In addition, Merck had shown a disregard for orders of the court, and had shown no remorse.

Merck also addressed the court. He initially said to the judge, "So, there's a -- your pens, your pens [are] right there, right? I want one of them to come to my hand. How do I do that?" Merck stated that he had been "locked up over and over and over and over again" but had "never gotten a program before."⁶ He added that he did not need to go to prison, only to return to San Diego to panhandle again; he needed a program.

⁶ It appears that Merck was referring to a drug or mental health treatment program.

The trial court denied Merck's *Romero* motion, finding nothing that made Merck's case exceptional and outside the spirit of the Three Strikes Law. The court stated, "This was absolutely a crime spree. Breaking and entering into people's homes, taking their property and just continued lawlessness, and I've got to protect the public." The trial court sentenced Merck to the low term, and struck the one-year prison prior term, ultimately imposing a total sentence of 18 years four months in prison.

2. *Legal standards*

To establish a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient in that it "fell below an objective standard of reasonableness," evaluated "under prevailing professional norms." (*Strickland v. Washington* (1984) 466 U.S. 668, 688 (*Strickland*); *People v. Ledesma* (1987) 43 Cal.3d 171, 216 (*Ledesma*).)

"When examining an ineffective assistance claim, a reviewing court defers to counsel's reasonable tactical decisions, and there is a presumption counsel acted within the wide range of reasonable professional assistance." (*People v. Mai* (2013) 57 Cal.4th 986, 1009.) Thus, "[w]hen the record on direct appeal sheds no light on why counsel failed to act in the manner challenged, defendant must show that there was 'no conceivable tactical purpose' for counsel's act or omission." (*People v. Centeno* (2014) 60 Cal.4th 659, 675.)

If counsel's performance has been demonstrated to have been deficient, a defendant is entitled to relief only if he can also establish that he was prejudiced by

counsel's deficient performance. (*Strickland, supra*, 466 U.S. at pp. 691–692; *Ledesma, supra*, 43 Cal.3d at p. 217.)

3. *Analysis*

Merck asserts that his trial counsel's conduct, related to his *Romero* motion, was deficient because trial counsel failed to adequately present evidence related to Merck's mental health issues. Merck discusses at length various findings and notations from the reports submitted by multiple clinicians who examined Merck after he was arrested on the charges in this case. Merck contends that all four experts' "assessments and conclusions are consistent—appellant suffers from a substantial psychiatric disorder that is only abated when appellant is taking his prescribed antipsychotic medications." He further suggests that because there was "no mention" of his mental disorders in the probation report or supplemental probation report, and because the sentencing judge was not the same judge who presided over the proceedings addressing Merck's competency, it was up to his attorney to "fill this void." Merck maintains that defense counsel's description of Merck's mental health issues was insufficient in this regard. We disagree with this reading of the record.

Counsel filed a six-page statement in mitigation, which included his *Romero* motion. The introduction included a reference to the court file, which "contains more than adequate evidence of client's history of legal incompetency issues, and by extension mental health issues, in the form of two separate commits to Patton State Hospital pursuant to Penal Code section 1368 *during the pendency of this case alone.*" (Italics in original.) In addition, the prosecutor's statement in aggravation included information

regarding the fact that Merck had been deemed incompetent twice during the pendency of the action. Further, the mental health examinations on which Merck is now relying were in the court's record. It is clear from these reports, as well as from the fact that Merck was deemed incompetent to stand trial at two different points during the proceedings, that the clinicians had determined that Merck suffered from *substantial* mental health problems. Defense counsel was not obligated to summarize the details of these reports or provide details from these reports, which were available to the court, in briefing the issues.

Further, defense counsel may have made a tactical decision not to present additional, specific evidence regarding Merck's past diagnoses of mental disorders. It was clear to everyone, the court included, that Merck had been deemed incompetent twice in the two years prior to the sentencing hearing. In addition, the trial court experienced first-hand some of the symptoms of Merck's mental health issues, such as when Merck asked the court to help him learn how to move an object without touching it. Given the significance of the incompetency determinations, defense counsel could have reasonably determined that it was not necessary, and would not have been particularly helpful, to present additional specific details of Merck's mental health history.

Further, the mental health reports were not particularly favorable to Merck. To the contrary, the reports contained a significant amount of information that counsel could have reasonably determined would negatively impact the court's sentencing decision. For example, Merck had been diagnosed as having "[a]ntisocial personality," and was considered to pose a danger to himself and others if not medicated. In addition, he was

determined to be at high risk for discontinuing his medications. There were indications that he had behaved in an assaultive manner toward others who were in custody with him, and that he had also assaulted staff. Defense counsel could have reasonably concluded that certain details from the psychological and psychiatric examinations of Merck would not have placed him in a sympathetic light for purposes of the court's assessment of the *Romero* motion.

We conclude that defense counsel's tactical decision with respect to how to address Merck's mental health issues for purposes of sentencing did not fall below an objective standard of reasonableness, and, therefore, did not constitute ineffective assistance of counsel. (See *Strickland*, *supra*, 466 U.S. at p. 688.)

B. *Merck is entitled to have the trial court exercise its discretion as to whether to impose or strike the five-year prior serious felony enhancement, under a new provision of law*

On September 30, 2018, the Governor signed S.B. 1393, which became effective on January 1, 2019. S.B. 1393 amended sections 667, subdivision (a) and 1385, subdivision (b) to allow a trial court to exercise its discretion to strike or dismiss a prior serious felony enhancement for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1–2.) Under the previous versions of these statutes, the trial court was required to impose a five-year consecutive term for "any person convicted of a serious felony who previously has been convicted of a serious felony" (former § 667, subd. (a)(1)). The court had no discretion "to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667" (former § 1385, subd. (b)).

Merck contends that S.B. 1393 applies retroactively to all cases or judgments of conviction in which a five-year enhancement term was imposed at sentencing based on a prior serious felony conviction, provided the judgment of conviction was not final at the time S.B. 1393 became effective on January 1, 2019, and that a remand for a new sentencing hearing is therefore required. The People concede the issue and agree that the new law applies to Merck's case "retroactively" because his judgment was not final at the time the law went into effect.

In *People v. Garcia* (2018) 28 Cal.App.5th 961 (*Garcia*), another division of this district agreed with the position taken by both Merck and the People in this appeal, and held that "it is appropriate to infer, as a matter of statutory construction, that the Legislature intended [S.B.] 1393 to apply to all cases to which it could constitutionally be applied, that is, to all cases not yet final when [S.B.] 1393 becomes effective on January 1, 2019." (*Id.* at p. 973.) We agree with the *Garcia* court's analysis, as well as its conclusion. We accept the People's concession that the amendments to S.B. 1393 apply retroactively to Merck's case and entitle Merck to resentencing. Remand is therefore appropriate to allow the trial court to resentence Merck and to exercise its new discretion with respect to whether to strike the five-year prior serious felony enhancement.⁷

⁷ We do not intend to suggest that the trial court should exercise its discretion to strike the enhancement at issue here; we make no comment as to the propriety of such a decision. We remand solely to allow the trial court the opportunity to exercise its discretion.

IV.

DISPOSITION

The judgment of conviction is affirmed. The sentence is vacated, and the matter is remanded for resentencing. Upon resentencing, the court shall consider whether to exercise its discretion to strike Merck's prior serious felony enhancement.

AARON, J.

WE CONCUR:

McCONNELL, P. J.

HUFFMAN, J.